Supreme Court, U.S.
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No. 92-1100

In The

Supreme Court of the United States

October Term, 1992

JEROME J. NORTON,

Petitioner,

vs.

RICHARD ROSEN AND SUSAN ROSEN and THE UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

EDWIN L. WOLF
Attorney for Petitioner
131 Jericho Turnpike
Jericho, New York 11753
(516) 333-6622

3062
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

EDITOR'S NOTE

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PRELIMINARY STATEMENT

Jerome J. Norton ("Norton") respectfully submits this Reply Brief in response to the Brief for Richard Rosen and Susan Rosen ("Rosens"), hereinafter cited as ("B.O., p. __"). Norton's Petition will be cited as ("Pet., p. __").

This Brief is necessitated by Rosens' numerous misstatements of the facts and misreading of the cases.

I.

THERE IS NO ABSENCE OF CLEAR STATUTORY LANGUAGE OR LEGISLATIVE INTENT AS TO HOW INTEREST IS TO BE CALCULATED.

The Rosens claim that Norton's interpretation of the words "amount paid" is too favorable to a tax sale purchaser begs the question. The House and Senate Reports (*see* Pet., p. 11) U.S.C.A. 83rd Congress - Second Session, V. 3, House Report, p. 4133 and Senate Report, p. 4777, state that the intent of § 6335(e) is to encourage and induce the highest price possible. Obviously, a construction whereby interest is payable from the date of each installment rather than from the date of purchase would be counter-productive. It should be noted that using the example given by the Rosens (B.O., p. 24) the resultant interest payable by the Rosens would still be at the rate of 20% regardless of the rate of interest returnable to Norton.

The Rosens misinterpret the case of *P.R. DeBellis Enterprises Inc. v. Lumbermen's Mutual Casualty Company*, 77 N.J. 428 (1978) (B.O., p. 19). The court in *DeBellis* used § 6337[1] to

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1. Unless otherwise noted all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.) as amended.

determine the value of a tax sale purchaser's interest. The court held that the insured was entitled to recover the value of his interest in the property amounting to at least the amount expended at the tax sale plus interest. In *DeBellis*, the tax sale purchaser paid the price in two (2) installments and was allowed interest on the full purchase price from the date of the public sale. Thus, the court construed the words "the amount paid by such purchaser and interest thereon" under § 6337(b)(2) as being in the "singular" and not in the "plural" as opined by the Circuit Court in this case.

Miller v. New Jersey Insurance Underwriting Association, 82 N.J. 594 (1980) decided subsequent to *DeBellis* refers to *DeBellis* as the definitive case in New Jersey and holds that the interest of the tax sale purchaser is to be valued at the price paid for the property regardless of whether payment was made in a lump sum or installments.

It is noteworthy that the Rosens (B.O., p. 19) agree with Norton that the case of *Deputy v. DuPont*, 308 U.S. 488 (1940) does not support the conclusion of the Circuit Court.

II.

THE ROSENS WERE NOT MISLED BY SILENCE ON THE PART OF NORTON.

The Rosens claim to have been misled by Norton's acceptance of the Rosens' request to produce himself for redemption and then not advising them as to the correct amount is both belated and contrary to their initial claim that the amount tendered based on simple interest was the correct amount. Information as to the correct amount and its calculations was not exclusively within the knowledge of Norton and neither the Rosens, nor their attorney Edwin Bernstein ("Bernstein") nor the title closer, Christine deSaulles ("deSaulles"), ever requested verification of the amount

due. In fact, the uncontradicted notes of the witness, to the tender on September 29, 1986, Kathleen Hess, state that when Norton said he declined the tender, deSaulles and Bernstein each said "Thank you", turned and left before Norton and Kathleen Hess went into Norton's house and made no inquiry as to the basis of his declination (Supp. App., *infra* at 1a). The statements in Rosen's Brief (B.O., pp. 28, 32) that the District Court found that Norton did not act in good faith completely ignore the court's subsequent reversal on this aspect.[2] On the other hand, the uncontroverted evidence in the record shows that the Rosens did not certify the check[3] for $151,250.00, nor did deSaulles type her letter to Norton until September 29, 1986, the date of the defective tender. In his deposition before trial, Bernstein testified that the main purpose of his letters and telephone call to Norton antedating September 29, 1986, was to set a date for tender; and that the date of September 29, 1986 was selected and offered by Bernstein to Norton in a letter dated September 15, 1986, because at the time the Rosens could

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2. Initially, Magistrate Judge Jordan, while recognizing the overwhelming evidence of conditionality, overcame that aspect of the Rosens' tender by holding that Norton's non-disclosure of his reasons for rejection of tender constituted lack of "good faith" and therefore was "bad faith." Upon reargument, having been misled, Magistrate Judge Jordan altered his position and reversed himself and held that Norton's refusal of the tender was proper and thus not an act of "bad faith" (or lacking in "good faith") stating as follows: "Plaintiff's request for an order striking the award of pre-judgment interest to defendant is denied. Plaintiff's argument that the original tender of the certified check in the amount of $151,250.00 met the statutory requirements of seized property was previously presented to both Judge McLaughlin and this Court and rejected. Both Judge McLaughlin and this Court determined that the tender of the certified check . . . was insufficient to meet the statutory requirements . . . for redemption of seized property in that the check was deficient by $498.86. In the light of this deficiency, both Judge McLaughlin and this Court held that defendant's rejection of tender to be proper. . . ."

3. Rosens, below, argued that the check was a "bank" check which couldn't be "stopped." This argument appears to have been dropped.

not be sure when their arrangements to borrow would be concluded.

Assuming, however, an earlier date had been agreed upon, there remain three problems with the Rosens' arguments.

The First Is That The Date Selected By Norton For Redemption Was Entirely Immaterial And Irrelevant. At no time between 11:00 A.M. on September 29, 1986, when the defective tender was declined and midnight that day, did the Rosens ever offer to increase the amount tendered to make up for their shortfall. At no time subsequent to tender being declined, during the hours of 11:00 A.M. to midnight, did the Rosens: (a) ever inquire of Norton as to the amount he claimed due or the basis of his declination; or (b) make any effort to advise Norton they expected him to disclose his reasons. Since knowledge as to the amount due was not exclusively within the knowledge of Norton, he had no obligation to state the correct amount owing.[4]

The Second Is That The Rosens Were Not Concerned With Whether Norton Accepted Or Declined the Tender because they erroneously believed that they could make a valid substitute tender to the IRS In his deposition before trial, Bernstein, stated that he had determined, prior to contacting Norton and without any justifying basis for assuming that Norton would evade payment, that as an alternative to tendering payment to Norton, he would tender payment to the IRS. However, since Norton could be

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4. The cases of *Litwak v. Wolkenberg*, 130 A.D. 2d 630 (N.Y. App. Div., 2d Dept. 1987); *Howe v. Allied Van Lines, Inc.*, 622 F.2d 1147 (3rd Cir. 1980) and *General American Life Ins. Co. v. Anderson*, 156 F.2d 615 (6th Cir. 1946) cited by the Rosens (B.O., pp. 32, 33) are inapplicable to the case at bar and do not require that the tenderee, at the time of tender, make known the basis of the tenderee's rejection, as claimed by the Rosens. Rather, they stand for the proposition that the time of trial, the tenderee who has theretofore rejected the tender must provide adequate basis for his refusal or lose his right to interest from the date of tender.

"found" (and, was found) within the county in which the land to be redeemed was situated, the Rosens were not entitled to make a "back-door" tender to the IRS In *Silver Bell Industries Inc. v. United States et ano.*, 74-2 U.S.T.C. ¶9691 (D. Colo. 1947), *aff'd*, 76-1 U.S.T.C. ¶9432 (10th Cir. 1976), *cert. denied*, 429 U.S. 822 (1976), the Court held that tender to the IRS was available only where the owner cannot locate the purchaser.[5] The purported tender which the Rosens claim to have made by their letter to the IRS dated September 29, 1986, written immediately subsequent to Norton's declination, was and is totally invalid and of no force or effect. The letter from Bernstein to the IRS of September 29, 1986, could not constitute a tender because; (i) no monies were enclosed; (ii) there is no evidence that the Rosens had any monies other than those controlled by deSaulles to tender to the IRS.

The Third Is That To Effect Tender, It Must Be Absolute And Unconditional. In the beginning, common law required, to establish a debt, that there must be witnesses (*secta*). This was several hundred years later changed to consideration (*quid pro quo*). Here, Norton, as purchaser, had no need to establish the debt by witnesses or by consideration because the debt of the Rosens was admitted in writing.[6] Therefore, contrary to the Rosens' contention (B.O., p. 34), the demand by the Rosens for the Certificate of Sale ("Certificate") must be construed as the attachment of a condition precedent.

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5. The case of *Guthrie v. Curnett*, 417 F.2d 764 (10th Cir. 1969) cited by the Rosens (B.O., p. 25) is distinguishable on its facts. In *Guthrie* the court found that the purchaser had deliberately made himself unavailable for "in personam" tender and that therefore the IRS was bound to accept substitute timely and sufficient tender. In the case at bar, Norton made himself available for "in personam" tender.

6. *Murray v. United States*, 686 F.2d 1320 (1982), *cert. denied*, 459 U.S. 1147 (1983) supports Norton's argument that the debt is not terminated by the tax sale and that the right of redemption is not a contract for the re-purchase of property.

A tender is ineffectual as such where it is coupled with a condition that it be accepted in full payment if the creditor, in good faith, believes that a larger amount is due, and this is so notwithstanding that it is ultimately held that the amount tendered was the correct amount. *United Gas Pipe Line Co. v. Tyler Gas Service Co.*, 162 F. Supp. 496 (E.D. Texas 1958), citing *Bohler v. Callaway*, 267 U.S. 479 (1925). In *Bohler* this Court held that one is not relieved by tender of the amount finally determined as correct, if the tender is upon condition that it be received in full payment of the claim.

The rule, as stated in 52 Am. Juris. 232, is:

> But tender of an amount less than the creditor claims is due is not effectual where coupled with conditions which render its acceptance by the creditor as an admission that no greater amount is due. This rule applies as well where the tender is in fact of an amount in full of all claims as where it is not; whether or not the amount of money tendered is in full is a question that the creditor has a right to contest in every case.

The Rosens' defective tender of September 29, 1986, was not a strictly unconditional tender of the full amount owing in order to redeem that day. In deducting $498.86 from the amount of interest owing in the tender, the Rosens, in effect, made a compromise offer on their indebtedness. If Norton had accepted the tender, he would be deemed to have acquiesced in the compromise offer, and would have been thereafter precluded from contesting the Rosens' computation. Norton was not obligated by the redemption statute to forfeit his right to claim the difference.

In *Certified Corporation v. Market Center, Ltd.*, 452 P.2d 442

(1969), the Supreme Court of Hawaii, in affirming the Circuit Court's denial of tender, stated in that regard:

> Appellant's tender of November 1, 1965 was not an unconditional tender of the full amount owing on the note on that day. In deducting $2,390.40 in the tender, appellants, in effect, made a compromise offer on their claim, for the full amount of the claim was $2,939.97, as stated in their counterclaim to appellee's action. If appellee had accepted the tender, it would be deemed to have acquired in the compromise offer, and would have been precluded from contesting appellant's claim.

Accord Davidge v. Simmons, 266 F. 1018 (D.C. Cir. 1920) and cases cited therein. A reasonable reading of the letter of deSaulles dated September 29, 1986, (Supp. App., *infra* at 4a) in conjunction with her testimony before trial, confirms it was her intention that as a condition of the tender, that Norton: (i) give up any claim to additional monies; (ii) take the risk of any failure of payment of the check upon presentation;[7] and (iii) surrender back to and through her to the Internal Revenue District Director the Certificate.

In his deposition before trial, Bernstein, testified unequivocally that in going to Norton's home with deSaulles on September 29, 1986, the intent was to obtain the Certificate which Norton had received from the IRS in exchange for the lender's check.

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7. Certification at the drawer's request does not operate to transfer to the payee the amount of the check, and does not import that there is a specific fund applicable to the payment of the check. *See Admiral Leather Corp. v. Manchester Modes, Inc.*, 422 F. Supp. 387 (S.D.N.Y. 1976).

In her deposition before trial, deSaulles repeatedly testified that in going to Norton's home her intent was to obtain the Certificate in exchange for the lender's check. Thus, the evidence in the record clearly shows that the conditionality of the tender here was no "chance" happening. First, in order to give the lender a first mortgage lien position, the three unsatisfied federal tax liens remaining after the sale to Norton had to be subordinated. When Bernstein and deSaulles were advised by the District Director that he would issue a subordination only after redemption and only when, as and if the Certificate, previously issued by the IRS and held by Norton, was obtained and delivered to the District Director, Bernstein and deSaulles determined to make delivery of the lender's check conditional on delivery by Norton of the Certificate.

Second, in order to close the Rosens' mortgage loan, the lender required its Title Company insure to it that it had a first mortgage lien position. deSaulles could only accomplish this by "omitting" the three unsatisfied federal tax liens as exceptions to the Title Company's insurance coverage on condition that she obtain the Certificate from Norton. Arrangements were thus made for a face-to-face meeting with Norton, rather than mailing him the check, in order that the Certificate could be obtained as a condition precedent to delivery of the lender's check.

It should be noted that Rosens were, at all times, in connection with their defective tender, represented by legal counsel and that Norton was not, and that the actions taken and the course of conduct pursued by the Rosens was based upon legal advice, however erroneous. The Rosens, having pre-determined, with the help of their attorneys, the amount to be tendered to Norton, the conditionality of tender they would make and the course of action they would take in the event of declination by Norton thereby took upon themselves the risk of the consequences of their actions (whether foreseen or unforeseen), and should not now be heard to

complain that there was any delay in the setting of a date for tender, or the absence of advice from Norton as to amount to be tendered.

III.

THE CLEAR IMPORT OF THE STATUTE MAY NOT BE VITIATED BECAUSE THE WORDS LEAD TO A HARSH RESULT.

It is the contention of Norton there should be literal compliance with the positive directions of § 6337 and that failing this, there is no redemption. The Rosens' contention that redemption statutes are to be liberally construed does not mean that their provisions should be disregarded. *See DeTreville v. Smalls*, 98 U.S. 174 (1879). In *Chapman v. United States*, 111 S. Ct. 1919 (1991), this Court held the "rule of lenity" is applicable only where the intention of Congress is not clear from the act itself and "comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers". In *Silver Bell Ind., Inc. v. United States, supra,* the Tenth Circuit Court held that the rule was not applicable notwithstanding that the amount tendered in one instance was only $7.21 less than required, and in the other instance was $23.36 less than required, stating:

> The redemption attempted was not in the amount paid by such purchaser and interest thereon at the rate of 20 percent per annum. The general rule is that . . . all that is due must be tendered.

Contrary to Rosens' statement (B.O., p. 12) Judge McLaughlin found that the Rosens' tender was "deficient" (Pet., p. 53a).

It is respectfully submitted that the Rosens' construction of

the "rule of lenity" would vitiate the clear import of Congress' chosen words.

CONCLUSION

Norton's Petition for Writ of Certiorari should be granted for the reasons set forth in the Petition and in this Brief. Execution of the Judgment of the District Court based upon the decision of the Circuit Court has been stayed pending determination of Norton's Petition for Writ of Certiorari (Supp. App., *infra* at. 6a).

Respectfully submitted,

EDWIN L. WOLF
Attorney for Petitioner
131 Jericho Turnpike
Jericho, New York 11753
(516) 333-6622

Dated: February 2, 1993

APPENDIX A — DEPOSITION OF KATHLEEN HESS REGARDING NOTES OF CONVERSATION DATED SEPTEMBER 29, 1986

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

Kathleen Hess, being duly sworn, deposes and says:

1. I reside at 3215 North Jerusalem Road, Levittown, NY 11756.

2. At the request of Jerome J. Norton, I was present to take notes of the meeting between Jerome J. Norton and Richard and Susan Rosen on September 29, 1986 at 220 Summit Way, Syosset, NY 11791.

3. Present at the meeting were: Jerome J. Norton, Howard Norton, Ms de Saulles (title company), Mr. Bernstein, and myself.

4. The following are my notes of conversations and events of that meeting:

DATE: September 29, 1986 PLACE: 220 Summit Way
Syosset, NY 11791
Front porch

PRESENT AT MEETING: Jerome Norton, Howard Norton, Ms de Saulles - Title Company, Mr. Bernstein, Kathleen Hess

Mr. Bernstein Mr. Norton

Jerome Norton Yes, and you are?

Appendix A

Mr. Bernstein	Ed Bernstein and Ms de Saulles from the title company
Jerome Norton	Excuse me (Mr. Norton goes into house)
Mr. Bernstein	Mrs. Norton?
Kathleen Hess	No (Mr. Jerome Norton returns to porch with folder)
Jerome Norton	What is it you have?
Ms de Saulles	A certified check and a letter (gives letter to Mr. Jerome Norton, who hands it back pointing to the lack of signature)
Ms de Saulles	Sorry I didn't sign it.
Mr. Bernstein	Do you have a pen? (Mr. Jerome Norton gives pen to Mr. Bernstein who hands it to Ms de Saulles, Ms de Saulles signs letter and return pen.)
Jerome Norton	What is the amount of the check? (Ms de Saulles holds check up for Kathleen Hess to see) Kathy? (Kathleen Hess looks at check)
Ms de Saulles	The amount is $151,250.00
Jerome Norton	That is what you owe?
Ms de Saulles	Yes

Appendix A

Jerome Norton	Is this my letter?
Ms de Saulles	Yes it is.
Jerome Norton	I decline to accept the tender.
Ms de Saulles	Thank you.
Mr. Bernstein	Thank you.

Ms. de Saulles and Mr. Bernstein turn and leave. Messrs. Norton and Ms Hess go into the house.

s/ Kathleen Hess
Kathleen Hess

Sworn to before me
this 2nd day of February,
1987
s/ Emily E. Pujia
EMILY E. PUJIA
Notary Public, State of New York
No. 30-8454950
Qualified in Nassau County
Commission Expires June 30, 1988

APPENDIX B — LETTER FROM CHRISTINE DE SAULLES DATED SEPTEMBER 29, 1986

CONGRESSIONAL ABSTRACT CO., INC. A-47b

1505 KELLUM PLACE
P.O. BOX 806
MINEOLA, NEW YORK 11501

(516) 741-1260

September 29, 1986

Mr. Jerome Norton
220 Summit Way
Syosset, New York 11791

Re: Title No. CAF-2604-N86
Premises: 67 Hidden Ridge Drive
Syosset, New York 11791

Dear Mr. Norton:

Enclosed please find Fidelity New York, F.A. check drawn to your order in the amount of $151,250.00 to redeem the tax lien purchased by you on the captioned premises on April 1, 1986. This figure is arrived at as follows:

Purchase price of the lien	$137,500.00
Interest for 6 months @ 20% p.a.	13,750.00
	$151,250.00

This check is delivered to you against my receipt from you of a transfer of the certificate of sale (I.R.S. Form 2435).

Very truly yours,

Christine de Saulles
Title Closer

APPENDIX C — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK FOR A STAY OF THE EXECUTION OF THE JUDGMENT FILED JANUARY 15, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RICHARD ROSEN and SUSAN ROSEN,

Plaintiffs,

-against-

JEROME J. NORTON and UNITED STATES OF AMERICA,

Defendants.

DECISION AND ORDER

Motion by defendant Norton, by order to show cause dated January 7, 1993 and attached papers, for a stay of the execution of the judgment herein dated November 18, 1992, to the extent that the date for delivery of the check be delayed pending determination of proceedings in the United States Supreme Court. Plaintiffs oppose by counsel's affidavit and memorandum of law both dated January 12, 1993, and defendant replies by counsel's affidavit of January 13, 1993.

The motion is granted. Delivery of the check is delayed as specified in the order to show cause.

So Ordered.

Dated: Hauppauge, New York
January 15, 1993

s/ David F. Jordan
DAVID F. JORDAN, U.S.M.J.